SAM KOK FUE & ANOR.

v.

CHANG CHENG HUAT & ANOR.

HIGH COURT MALAYA, SHAH ALAM
MAHADEV SHANKAR J
[SUIT NO. 22-194-90]
1 APRIL 1992

LAND LAW: *Sale and purchase agreement - Application for summary judgment under O. 81 - Prayer for return of funds paid by plaintiff RM21,000 and interest thereof - Whether the vendors in addition to their contractual obligations also obliged to fulfil obligations to MBB - Not pleaded in amended statement of claim - Whether conditions unreasonable - To the effect of making the vendors insurers for MBB against all risks.*

On 18 April 1989 the defendants (the vendors) agreed in writing (the said agreement) to sell their house to the plaintiffs (the purchasers). Each party avers that the said agreement was breached by the other and claims for consequential relief.

On the facts, this formal agreement made no reference to the amount of the purchasers' bank loan. Nor did it refer to the amount of the vendors' loan with BBMB. The absence of this information must lead to the inference that each party was to make its own arrangements to make good the difference required. The purchasers also filed a caveat to protect their interest.

Up until the legal actions were filed both parties appeared to have kept the said agreement open for performance until this action was filed, prior to which the joint solicitors discharged themselves from acting further for both parties on 25 January 1990.

Held:

[1] In granting this remedy this Court is of the view that from 18 September 1989 an added liability the defendants have had to bear is the interest element on their loan with BBMB. Plaintiffs did not obtain the release of their loan for RM63,000 and therefore lost no money.

[2] The effect of this judgment therefore is to extinguish the claim for the purchasers to treat themselves as equitable owners of the said property since 18 July 1989 and adjust the accounts accordingly.

[3] Dealing with the plaintiff's claim for summary judgment the learned Judge found as a finding of fact that the plaintiffs breached the agreement. The said breach occured in 18 September 1991, because that was the last day for the performance of their side of the bargain. By Clause 13 of the said agreement time was made of the essence.

[Plaintiffs claim dismissed with costs and the counterclaim by the defence allowed.]

Legislation referred to:
Rules of the High Court 1980, O. 81

For the plaintiff - Mohan Ghandi; M/s. Mohan Ghandi & Associates
For the 1st defendant - P.Y. Chong; M/s. C.K. Tan & Chong

JUDGMENT

Mahadev Shankar J:

On 18 April 1989 the defendants (the vendors) agreed in writing (the said agreement) to sell their house to the plaintiffs (the purchasers). Each party avers that the said agreement was breached by the other, and claim for consequential relief. The details now follow.

At the time of the said agreement the vendors were legally married to each other. Their house aforesaid and the land on which it stood (collectively referred to as "the said property") was charged to Bank Bumiputra Malaysia Bhd. (BBMB).

The price agreed was RM84,000. The purchasers made it known that they intended to apply for a bank loan to finance the purchase.

Both sides were represented by the same firm of solicitors (the joint solicitors) who prepared a formal written agreement, which they all signed. The purchasers then paid RM8,400 being 10% of the purchase price. The balance of RM75,600 was to be paid in three months (that is on or before 18 July 1989). If the purchasers were unable to do this the vendors were required to grant an extension period of two months (that is up to 18 September 1989). During this extended period the purchasers were required to pay 9% interest on the balance sum of RM75,600.

This formal agreement made no reference to the amount of the purchaser's bank loan. Nor did it refer to the point of the vendor's loan with BBMB. The absence of this information must lead to the inference that each party was to make its own arrangements to make good the difference required.

Both parties expected the deal to go through without any hitch. Such was their optimism that shortly after the said agreement was executed, the first defendant (the vendor husband) by a collateral verbal agreement allowed the first plaintiff (the purchaser husband) into occupation of the said property. A rental of RM300 per month was agreed. This was paid by the first plaintiff to the first defendant for the months of May and June 1989. Receipts were issued by the vendor husband. They are signed by him alone and are in favour of the first plaintiff alone. They state the payments are for "rent". Although there was nothing in the said agreement permitting this, the purchasers filed a caveat to protect their interest.

The purchasers then applied to Malayan Banking Bhd. (MBB) for their loan. MBB agreed to grant RM63,000. By a letter dated 20 May 1989 MBB's solicitors wrote to the Joint Solicitors to tell them so. But MBB's agreement to grant this loan came with many strings attached by ways of conditions precedent which the said agreement did not specifically provide for. One of these conditions was that BBMB should give MBB a direct written undertaking to refund the redemption sum in the event that the relevant discharge of charge is not registered for any reason whatsoever. (The terms of this letter show that MBB's solicitors were assuming that the redemption sum in question was less than the RM63,000 they had agreed to lend the purchasers). Another condition was that both vendors give MBB a direct written undertaking to MBB to refund the said loan of RM63,000 so released in the event that the transfer of the said property was not registered for any reason whatsoever.

On 18 July 1989 the purchasers paid the joint solicitors RM12,600 being the difference between the purchase price and the loan MBB had agreed to grant them. Having paid this sum the purchasers stayed on in the premises. They did not pay any rent thereafter.

On 24 July 1989 the joint solicitors wrote to BBMB and received a reply dated 10 August 1989 in which they were informed that BBMB's redemption sum as at 30 September 1989 was RM85,844.13. The unrebutted evidence of the vendor husband is that he was not informed by the joint solicitors of this or of MBB's conditions until he received their letter dated 14 October 1989. A further letter dated 8 November 1989 followed enclosing formal copies of the two undertakings aforesaid required by MBB. These undertakings came as a complete surprise to the vendors because they had never agreed to them in the first place.

By November 1989 the vendor husband and his wife were divorced. The vendor husband found himself incapable of undertaking the refund of the RM3,000 because that money was not being paid to him but to BBMB. By this stage the amount due to BBMB was RM73,244.13. The joint solicitors tried to prevail upon the vendors to pay BBMB RM10,244.13 and sign the undertakings so that the MBB loan could be released. But unless the balance of the purchase price was paid first to BBMB, the vendors were not prepared to produce the undertakings.

Thus the parties reached an impasse. MBB was requested to but refused to waive the undertakings they required. The joint solicitors then discharged themselves from acting further for both parties on 25 January 1990.

The vendor husband obtained independent advice. It would appear that some attempts were made to reach a reasonable settlement. When these failed, the vendor husband's solicitors gave formal notice on 31 May 1990 of the termination of the purchasers right to occupy the said property as monthly tenants with effect from 31 July 1990. He claimed rent since June 1989 at RM300 and double rent for holding over.

In July 1990 the purchasers filed this action for refund of the RM21,000 they had paid, damages and alternatively for specific performance. The first statement of claim did not disclose a cause of action because of the omission of certain essential averments. It was struck out with liberty to file afresh. In accordance with the consent orders made thereafter I am now able to dispose of this dispute by treating the fresh document filed as an amended statement of claim and all the other documents filed as pleadings property before me, with all the averments in the amended statement of claim deemed duly traversed.

On this basis there are two applications before me. The plaintiffs have applied for summary judgment under O. 81 (Encl. 9). They pray for the refund of their RM21,000 with interest thereon and damages. Plaintiff's Counsel says these damages must be equal to the difference in the increased price the purchasers must pay for equivalent alternative accommodation. Alternatively they pray for specific performance of the said agreement and further orders that the defendants settle the difference between the MBB loan and the BBMB and that the defendants further sign the letter of undertaking to refund the RM63,000 if the transfer cannot be registered. The defendants on the other hand have also prayed for final judgment on their counterclaim with specific prayers for arrears of rent of RM39,000 till 31 July 1990, double rent thereafter, and vacant possession.

The only contract upon which the purchasers rely in the pleadings is the said agreement dated 18 April 1989. They have pleaded in their reply and defence to the counterclaim that vacant possession was given in accordance with the said agreement, and that they paid rental for May and June 1989 because at that time the purchasers were not entitled to vacant possession.

The plain meaning of Clause 2 of the said agreement is that by 18 July 1989 the defendants should pay RM75,600. If they could not they had to pay this sum by 18 September 1989 and interest of 9% thereon. Provided the purchasers did so then by Clause 10 of the said agreement the vendors were obliged to deliver vacant possession within one month of the date of payment of the balance sum. In the context of this case this balance sum was RM63,000.

The purchasers contend that when they paid RM12,600 on 18 July 1989 they were entitled to vacant possession **under the said agreement** and therefore paid no rent thereafter but treated the case as one where they had fulfilled all their obligations under the said agreement.

In other words their stand is this. We have paid you RM21,000. We must pay you another RM63,000. Our bank is prepared to give us a loan for this amount. Go and get it from MBB by doing whatever they require of you.

With the greatest respect to the plaintiffs and their Counsel I am unable to countenance this submission. MBB's conditions were very onerous. They were never any part of the said agreement. The defendants had never agreed to them. The vendors attempts to dilute their severity cannot be held against them because it did not amount to a new contract. There was no consideration whatsoever for these new obligations they were asked to undertake.

As to the question of timing, if one confines oneself to the tenor of the said agreement Clause 2 required the payment of the full balance purchase price by the purchasers **before** the obligation of the vendors arose under Clause 3 to pay the redemption sum to BBMB. The purchasers sought to reverse that process in addition to requiring the undertakings aforesaid. In short the said agreement required the purchasers to give the vendors a bird in the hand. Instead they dangled a bird beyond their reach.

For the purchasers to succeed I need to imply a term into the said agreement that the vendors, in addition to their contractual obligations, also undertook to fulfill all the obligations imposed by MBB. This is not pleaded in the amended statement of claim. Even if it was, I am not prepared to do so. The conditions were unreasonable because they had the effect of making the vendors insurers for MBB against all risks.

I hold therefore that the purchasers were in breach of this agreement. Both parties however appear to have kept it open for performance until this action was filed. This raises some curious problems.

By their letter dated 31 May 1990 the vendors new solicitors only terminated the "tenancy". Nothing was said about the consequences of failure to complete. The purchaser's writ of 26 July 1990 claimed damages. It did not allege breach. The amended statement of claim filed on 27 February 1990 alleged breach. No date is specified but the plaintiff's claim of entitlement to vacant possession dates from 18 July 1989. The defence and counterclaim also alleges breach for failure to pay the balance of the purchase price. There is a prayer in the counterclaim for the balance to be paid in full with 9% per annum from 18 July 1989 which does not appear in the summons in chambers for final judgment on the counterclaim.

Dealing first with the plaintiff's claim for summary judgment (Encl. 9) I hereby order that it be dismissed with costs, because my finding is that the plaintiffs breached the said agreement. I hold that this breach occurred on 18 September 1989 because that was the last day for the performance of their side of the bargain. By Clause 13 of the said agreement time was made of the essence.

There is the question of the disposal of the RM21,000 paid by them. As to this my finding is that the defendants must set off this sum against their counterclaim. The plaintiffs allege that during their occupation of the said property they effected extensive renovations thereto. There is no evidence that they did this with the defendant's consent, or approval. Consequently they must take the situation now as they find it.

There are two aspects to the defendants counterclaim. The plaintiffs' status when they went into occupation on 1 May 1989 was clearly that of monthly tenants until such time as they could legally claim that they were entitled to vacant possession under the agreement. This entitlement never materialised. Had they paid the full balance sum they would have become equitable owners. They did not. So they continued as tenants from month to month. Thus

from 1 July 1989 till 31 July 1990 they must pay RM3,900. From 1 August till the date of this judgment they must pay double rent. This sum is a period of twenty months or RM12,000 up to 31 March 1992. Since they have no legal right to remain in possession I order them to give vacant possession of the said property with all its landlord's fittings and fixtures intact and in good and tenantable repair on 30 April 1992. Double rent to continue to be paid till vacant possession is given on that day.

In granting this remedy I have borne in mind that from 18 September 1989 an added liability the defendants have had to bear is the interest element on their loan with BBMB. Plaintiffs did not obtain the release of their loan for RM63,000 and therefore lost no money.

I further order that the caveat filed by the plaintiffs against the said property be removed forthwith. Upon the plaintiffs vacating the said property and the removal of the aforesaid caveat the defendants shall pay to the plaintiffs the balance, if any remaining in their hands from the sum of RM21,000 paid by the plaintiffs, after the deduction of the damages awarded herein.

The effect of this judgment therefore is to extinguish the claim for the purchasers to treat themselves as equitable owners of the said property since 18 July 1989, and against the accounts accordingly.

Notwithstanding the last prayer in the counterclaim for full payment of the balance of the purchase price and interest I do not consider that this is an appropriate case for an order of specific performance even at the instance of the successful defendants. This is a discretionary remedy. The Court will not order it if it involves subsequent supervision which this Court is not equipped to carry out. Once the plaintiffs elected to claim damages the said agreement was at an end. I would therefore leave it to the parties to renegotiate a fresh agreement if the plaintiffs are still minded to purchase this property.

It is to be noted also that the prayers in the counterclaim does not include any prayer for damages. I therefore make no award in respect of the interest element the defendants have lost because their loan to BBMB was not cleared on 18 September 1989.

The defendants must however be paid the costs of their counterclaim also as taxed by the SAR.

Also found [1992] 2 CLJ 1265